

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID A. KOSS and	:	CIVIL ACTION
FREYA B. KOSS,	:	
Plaintiffs,	:	NO. 97-440
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	

M E M O R A N D U M

BUCKWALTER, J.

February 4, 1998

Currently before the court is the United States' motion to dismiss Plaintiffs' quiet title action for failure to state a claim. For the reasons that follow, the court will grant the motion in part and deny it in part. As to the remaining issue -- whether plaintiffs received timely notice of an assessment against them for the 1974 Tax Year -- the court will treat the motion as one for summary judgment and solicit further submissions from the parties.

I. BACKGROUND

Plaintiffs David and Freya Koss challenge the validity of a federal tax lien against their property. See 28 U.S.C. § 2410 (a) (allowing quiet title action against government); 26 U.S.C. § 6321 (federal tax liens). They do not challenge the actual underlying assessment for their 1974 taxes but instead

allege that it was not timely, and that they did not receive proper notice of it. See Johnson v. United States, 990 F.2d 41, 42-43 (2d Cir. 1993) (quiet title action appropriate where taxpayer challenges procedural flaw in assessment).¹

In 1978, after the IRS questioned the Kosses' returns for Tax Years 1972 and 1974, they agreed to extend the three-year limitations period for assessing any deficiency for those years. See 26 U.S.C. § 6501 (c)(4) (allowing for contractual extension of limitations period). Specifically, the Kosses agreed that if the IRS sent them a notice of deficiency for either Tax Year:

the time for making such assessment will expire 60 days after the period during which the making of an assessment is prohibited. However, this agreement will not reduce the period of time otherwise provided by law for such an assessment.

Form 872-A.²

On December 5, 1980 the IRS officially notified the Kosses of a \$48,788.05 deficiency for Tax Year 1974, and they timely petitioned the Tax Court for redetermination. The Tax Court upheld the deficiency determination in 1989 and later

1. A finding that the assessment was procedurally flawed would not negate the Kosses' liability for the Tax Year 1974 deficiency, but it would preclude the IRS from proceeding against them administratively via a levy. The IRS would then need to institute a civil action to collect the deficiency. See United States v. Chila, 871 F. 2d 1015, 1018-19 (11th Cir. 1989).

2. In his affidavit, David Koss implies that because neither side had terminated the consent agreement, the sixty day extension did not take effect. This misreads the agreement, which requires that either the Kosses terminate the consent agreement, or that the Appellate Division conclude consideration of the case, not that the IRS terminate the agreement.

denied the Kosses' motions for reconsideration and a new trial. They timely appealed on January 26, 1990 -- without posting bond -- and the Court of Appeals for the Third Circuit affirmed the Tax Court on June 25, 1990. They did not petition the Supreme Court for certiorari.

On July 19, 1990, the United States assessed the Kosses \$193,849.51 for Tax Year 1974. The IRS sent notice by mail on the same day, according to the Certificate of Assessments and Payments which the IRS has attached to its Motion to Dismiss as Exhibit B. The IRS registered a federal tax lien against the Kosses' property in Montgomery County on January 31, 1991 and gave notice of intent to levy on December 23, 1996. (While the lien is also based on an assessment for 1972 taxes, they challenge only that portion of the lien based on 1974 taxes.)

II. DISCUSSION

The court may grant a 12(b)(6) motion to dismiss only if a complaint alleges no set of facts which, if proved, would entitle the plaintiff to relief. Hayes v. Gross, 982 F.2d 104, 106 (3d Cir. 1992). The burden is on the defendant to make such a showing. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991). The court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable

to the non-moving party." Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989).

A. Whether the assessment was timely.

The Kosses contend that the assessment for Tax Year 1974 was untimely. The Tax Code prohibits the IRS from making an assessment until the Tax Court decision becomes final, 26 U.S.C. § 6213 (a), and it suspends the limitations period for making an assessment until sixty days after that date. 26 U.S.C. § 6503(a)(1). Additionally, the separate agreement between the parties granted the IRS sixty days after the time for making an assessment was prohibited.

Because the Kosses did not petition the Supreme Court for certiorari, the Tax Court's decision became final upon the expiration of the ninety-day period for filing a certiorari petition -- September 23, 1990. 26 U.S.C. § 7481 (a)(2)(A). Ordinarily, the IRS would have had sixty days after September 23, 1990 to make an assessment. The Kosses, however, present a distinct case. Although they took an appeal, they did not post an appeal bond, and therefore their notice of appeal did not stay any assessment or collection of the deficiency once the Tax Court denied the Kosses' motion for reconsideration. 26 U.S.C. § 7485(a). Thus, although the IRS did not make the assessment during the pendency of the Kosses' appeal, it did make it on July 20, 1990, after the Court of Appeals had affirmed the deficiency

determination, but before the period for petitioning for certiorari had expired.

Because, in the absence of a bond, the IRS was not prohibited from making the assessment pending their appeal, the Kosses argue that, under the agreement, the IRS was required to make the assessment within the sixty day period following January 1990. The IRS rejects this argument because the agreement provides that it "will not reduce the period of time otherwise provided by law for such an assessment." It therefore argues that it could have made the assessment at any time between the Kosses' non-bonded appeal and the expiration of the period for filing a certiorari petition. In support, it relies on Kahn v. United States, where the Court of Appeals for the Second Circuit held that, when a taxpayer takes an appeal but does not file an appellate bond, "the IRS may make an assessment but . . . the government may nevertheless have the benefit of the tolling statute." 590 F.2d 48, 51 (2d Cir. 1978). See also id. at 51-52 (noting particular appropriateness of general doctrine that statute of limitations in tax cases should be construed in government's favor).

Although Kahn is not directly on point, for example, it does not involve an agreement of the type the Kosses signed with the IRS, it is nonetheless compelling. The court perceives no unfairness where the Kosses specifically agreed that the

allowable time for making an assessment would be no less than that provided by law, and where the relevant law gave the IRS until November 22, 1990 to make an assessment. As the Kahn court noted, adopting the Kosses' interpretation would ultimately be detrimental to taxpayers, as, to avoid running afoul of the statute of limitations, the IRS would need to institute collection proceedings against taxpayers with pending appeals, forcing the taxpayer to litigate the deficiency on two fronts simultaneously. Id. at 52. The court will accordingly dismiss the Kosses' quiet title action to the extent that it challenges the timeliness of the assessment for Tax Year 1974.

B. Whether Notice of the Assessment was Timely.

Distinct from the issue of whether the assessment was timely made, the Kosses question whether the IRS gave them timely notice of the assessment. The Tax Code gives the IRS sixty days in which to notify the taxpayer that an assessment has been made. 26 U.S.C. § 6303 (a). The Kosses do not dispute that the IRS made the assessment on July 19, 1990, but they claim that they did not receive notice of it until January 31, 1991. (Regardless of whether or not the Kosses received notice, the determinative issue is whether the IRS mailed it. United States v. Zolla, 724 F.2d 808, 810 (9th Cir. 1984); Pursifull v. United States, 849 F.Supp. 597, 601 (S.D. Ohio 1993)).

The IRS has offered a Certificate of Assessments and Payments (Form 4340), indicating that notice was sent on July 20, 1990. The Certificate creates a strong presumption that it did provide notice. See, e.g., Geiselman v. United States, 961 F.2d 1, 6 (1st Cir. 1992) (collecting cases); United States v. Nuttall, 713 F. Supp. 132, 137 n.8 (D.Del.), aff'd, 893 F.2d 1332 (3d Cir. 1989) (Table). In light of the Certificate of Assessments, the burden shifts to the Kosses to establish by a preponderance of the evidence that the information in the Certificate of Assessments is erroneous. See Sullivan v. United States, 618 F.2d 1001, 1008 (3d Cir. 1980); United States v. Carson, 741 F. Supp. 92, 94 (E.D. Pa. 1990).

The Kosses challenge the Certificate by claiming that it lists two items they never received and omits two items that they did receive. See Blackston v. United States, 778 F.Supp. 244, 246 (D.Md. 1991). Because the question cannot be resolved on a motion to dismiss, the court will treat the government's motion insofar as it regards the notice issue as one for summary judgment; permit the parties to make additional submissions with regard to the notice issue; and schedule a hearing on the summary judgment motion, at which both sides may supplement the record, if deemed necessary. Fed. R. Civ. P. 12(b) & 56.

An Order effectuating the foregoing memorandum follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID A. KOSS and	:	CIVIL ACTION
FREYA B. KOSS,	:	
Plaintiffs,	:	NO. 97-440
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	

O R D E R

AND NOW, this 4th day of February, 1998, upon consideration of Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (Dkt. # 5), and Plaintiffs' Response thereto (Dkt. # 6), it is hereby **ORDERED** that said motion is **GRANTED IN PART AND DENIED IN PART**, in accordance with the accompanying Memorandum. Pursuant to Fed. R. Civ. P. 12(b) and 56, it is further **ORDERED** that the parties shall submit to the court any additional evidence pertaining solely to the issue of notice by February 13, 1998, and that a **HEARING** on that issue will be held on **February 17, 1998 at 9:30 a.m.**, in Courtroom 14A of the United States Courthouse, 601 Market Street in Philadelphia.

BY THE COURT:

RONALD L. BUCKWALTER, J.